Editor's note: Reconsideration denied by Order dated April 18, 1983

CHRIS CLARIDGE
v.
BUREAU OF LAND MANAGEMENT

IBLA 82-1022 Decided February 18, 1983

Appeal from a decision of Administrative Law Judge Michael L. Morehouse, affirming a decision of the Safford, Arizona, District Office, Bureau of Land Management, reducing permitted grazing use on Federal grazing allotment. Arizona 040-81-2.

Reversed.

1. Evidence: Weight -- Grazing Permits and Licenses: Adjudication -- Grazing Permits and Licenses: Range Surveys

A determination by the Bureau of Land Management of the carrying capacity for a unit of the Federal range will be reversed where substantial evidence establishes error in the determination.

APPEARANCES: Dudley S. Welker, Esq., Safford, Arizona, for appellant; Fritz L. Goreham, Esq., Department of the Interior, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Chris Claridge appeals a decision of Administrative Law Judge Michael L. Morehouse, dated June 9, 1982, affirming a decision of the Safford, Arizona, District Office, Bureau of Land Management (BLM), reducing appellant's permitted grazing use on the Diamond Bar allotment from 350 CYL (cattle year long) to 290 CYL over a period of several years. 1/, 2/

1/ The decision was issued pursuant to 43 CFR 4110.3-2(c) (1980), which required the reduction in grazing use to be implemented in over a 3-year period. The decision reduces the use in 1981 to 315 CYL, in 1982 to 302 CYL, and in 1983 to 290 CYL. This regulation was amended subsequently, and now requires a three-increment implementation over a 5 year period. 47 FR 41703, 41706 (Sept. 21, 1981). It is now proposed to carry out the same reductions; but under the new regulations.
2/ Normally, cattle grazing under the Departmental grazing regulations is referred to as "Animal Unit Month" (AUM), meaning the amount of forage necessary for the sustenance of one cow or its equivalent for a period of

The Diamond Bar allotment consists of approximately 29,490 acres located in the Safford, Arizona, district. One hundred and twenty acres are private lands, 1,600 acres are state lands, and the remainder is Federal lands. The allotment is bordered on the west and northeast by the San Carlos Apache Indian Reservation, and has been used by the Claridge family for three generations.

According to BLM's files, the permitted allotment use was originally adjudicated in the 1940's at 400 CYL, were was raised in 1950 to 500 CYL. Appellant testified that as high as 600-700 CYL were permitted during World War II. In 1966, the permitted use was lowered to 400 CYL and, in 1971, it reached its lowest level of 300 CYL. In 1972, an Allotment Management Plan (AMP), prepared with appellant's cooperation, set the permitted use at 350 CYL, where it has remained.

In 1978, pursuant to the directions of NRDC, Inc. v. Morton, 388 F. Supp. 829 (D.D.C. 1974), aff'd, 527 F.2d 1386 (D.C. Cir. 1976), a range land survey was conducted on the allotment using ocular reconnaissance methods. BLM employees, using a helicopter, covered the entire 29,490 acres of the allotment in about 60 to 90 minutes, counting the number of cattle visible to them. The survey figure, 283 cattle, was adopted by the Environmental Impact Statement (EIS) formulated for that area, and was also used in the subsequent Range Management Program Plan (RMPP) prepared in March 1979.

On May 28, 1980, a range utilization study was conducted on the allotment by BLM. Using a formula designed to ascertain the desired livestock carrying capacity, the resulting calculation was 270 CYL. That figure was adjusted upward to 290 CYL based on an abnormal lack of precipitation for the general area during that particular growing season.

On September 8, 1980, BLM issued a proposed decision to lower the permitted grazing use to 290 CYL so that it would not exceed the carrying capacity established by the 1980 study. Although appellant protested on December 12, 1980, BLM issued its final decision that the current permitted grazing use exceeded the carrying capacity and, under 43 CFR 4110.3-2, reduced the permitted use, effective March 31, 1981. After an appeal was timely filed, a second range utilization study was conducted in April 1981. That study resulted in a carrying capacity calculation of 303 CYL. BLM's witness stated there was good precipitation during that growing season.

A hearing pursuant to the appeal was conducted by Judge Morehouse on December 15, 1981. At that hearing, three BLM employees testified concerning the surveys and formulas used in determining the grazing capacity which the decision was based upon. They explained that the allotment was stratified into areas of like topography and vegetation. Pace transects were conducted

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fn. 2 (continued)
1 month. 43 CFR 4100.0-5(e). Appellant's current permitted grazing use is 4,092 AUM, or the approximate equivalent of 350 CYL, and the proposed reduction would be to 3,272 AUM, or the appropriate equivalent of 290 CYL. However, because the witnesses at the hearing and related documents use CYL as the measuring unit, for convenience, our references will be to CYL.

at spots selected as representative of the different areas, the forage plants found there were clipped and weighed, and the utilization of those forage plants was estimated. The carrying capacity was calculated based on the utilization estimates. 3/ Testimony was presented that the methods used in both the 1980 and 1981 studies were similar to those methods used by the Forest Service and the Soil Conservation Service. When questioned concerning the accuracy of the range utilization studies, a BLM witness responded, "It was about five to ten percent margin of error." (Tr. 46, L. 21-22).

BLM's witnesses also testified that the allotment needed more intensive management and better water distribution, and noted that BLM's objective is to improve the forage production trend. However, these witnesses could not agree as to the stability of the range trends, as evidenced in one particular response:

> Judge Morehouse: All right. Now, from the time you've been out there and observed the allotment, have you been able to form an opinion as to the trend of this allotment; is it going up or down, or do you have an opinion as to the trend?
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> The witness: The trend to me seemed to be stable. (Tr. 53, L. 22 - Tr. 54, L. 3).

BLM's witnesses attributed a possible stable trend to the fact that appellant was carrying less cattle on the allotment than licensed for, according to their 1978 helicopter survey, which discovered only 283 cattle on the allotment.

Appellant and his father testified concerning previous management procedures and range conditions, claiming that the range has carried and can continue to carry 350 CYL without serious problems. When questioned as to the accurate number of cattle on the allotment, appellant and his father stated that although no actual use count exists, they have been carrying close to 350 CYL for the past 5 years. Appellant also testified concerning Indian cattle trespassing from the nearby reservation. He had documented proof that 39 trespassing cattle have been returned and estimates the cumulative impact of such cattle upon the range utilization to average 50 CYL. 4/

3/ The formula for carrying capacity calculations:

$$\frac{\text{Actual Animal Unit Months}}{\text{Actual Weighted Use Factor}} = \frac{\text{(Desired Animal Unit Months}}{\text{Allowable Weighted Use Factor}} \times$$

The Actual Animal Unit months used in BLM's calculations was the permitted use figure. The Actual Weighted Use Factor is the estimate from the range utilization study. The Allowable Weighted Use Factor is the preferred level of use as determined by the Santa Rita, Arizona, Experimental Range, U.S. Forest Service. (Tr. 16-18).

4/ Documents account for trespassing cattle held for inspection before their return and does not account for those herded back across the fenceline or returned without inspection. Appellant estimates he returned as many as 98 in 1980 and 1981, while only 13 of his strays were returned over a period of three years.

Several witnesses agreed that sections of the boundary fence are in poor condition, allowing cattle to easily trespass. Appellant claims that it is the responsibility of the reservation officials and the Bureau of Indian Affairs [BIA] to repair and maintain the border fencing between the reservation and the allotment, and that little has been done in recent years to keep it in good condition.

A private range consultant also testified for appellant based on his review of BLM's reports and his own field examinations. He did not question BLM's methods but disagreed with the figures used in their calculations, particularly focusing on the issue that BLM did not consider the Indian cattle trespasses. The consultant extensively testified that the carrying capacity could be adjusted higher based on better management and water distribution plans agreed to by appellant. A member of the advisory board established to assist the district office in grazing matters testified that the board examined the allotment in 1980 and recommended that the carrying capacity remain at 350 CYL.

When asked whether reduction of the carrying capacity would attain BLM's objectives, one of BLM's witnesses remarked that the approach was not certain to reach the desired effect. That same witness affirmed that both appellant and BLM recognize alternatives to increase the capacity. (See Tr. 91-95).

BLM's objectives for the allotment were based on the EIS and the RMPP which adopted the results of the 1978 aerial survey as the use count for the allotment. However, BLM's witnesses were not certain about the accuracy of that survey: "Q. That was going to be my next question and you anticipated it, aerial count by it's nature, is not as precise --. A. It's not precise, no." (Tr. 88, L. 9-12). BLM's figures for cattle on the allotment were estimates. No actual figures were established.

BLM's calculations of the carrying capacity were based on range forage utilization estimates which did not consider trespassing Indian cattle; as one BLM witness testified:

> Q. What allowances have been made in your estimates for grazing by cattle belonging to the Indians?
>
> A. We have not made any allowances for trespass cattle belonging to the Indians.
>
> Q. Would that make a difference in your figures?
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> A. It could make some difference, but we're of the opinion that the level of trespass use on there would be very low.

(Tr. 20, L. 6-14).

Judge Morehouse affirmed the decision of the district office because appellant failed to show by sufficient evidence that BLM's decision was in error. His decision held that, while appellant and his witnesses "disagree with the stocking rate set by BLM, * * * it has not been shown that there

was any error in [BLM's] findings, that there was any material departure from prescribed procedures, or that a more accurate survey indicated a different range capacity." Appellant's contentions that the impact of the Indian cattle trespasses should be accounted for were disavowed by Judge Morehouse on the reasoning that the figures were speculative and were likely offset by appellant's cattle trespassing on the reservation.

Appellant, in his statement of reasons, argues that the decision is unsupported by the facts and law. He contends that evidence concerning the extent of grazing by Indian cattle was sufficient to merit consideration in the calculation for grazing capacity. He also asserts that BLM has admitted the allotment was not overstocked at 350 CYL when they referred to the range as stable.

[1] Implementation of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. §§ 315, 315a-315r (1976), is committed to the discretion of the Secretary of the Interior. Allen v. Bureau of Land Management, 65 IBLA 196 (1982); Hugh A. Tipton, 55 IBLA 68 (1981). Section 2 of the Taylor Grazing Act specifically charges the Secretary with respect to grazing districts on public lands to "make such rules and regulations" and to "do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a (1976). 5/ The objective of the Act is to provide the most beneficial use of the public range while promoting and stabilizing livestock grazing interests in the districts created. See Hatahley v. United States, 351 U.S. 173 (1956); United States v. Fuller, 442 F.2d 504 (9th Cir. 1971); 43 CFR 4100.0-2.

An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the Departmental regulations for grazing, 43 CFR Part 4100. Allen v. BLM, supra; Rachel Ballow, 28 IBLA 264 (1976); 43 CFR 4.478(b). In cases questioning the accuracy of a range survey, a determination of carrying capacity will be set aside only where substantial evidence establishes error in the determination. In Smith v. Bureau of Land Management, 48 IBLA 385 (1980); quoted in Lines v. Bureau of Land Management, 66 IBLA 109, 112 (1982), we stated:

> * * * It is an oft-stated truism that the Secretary of the Interior has the right to rely on the conclusions of the Department's technical experts. See, e.g., Exxon Corp., U.S.A., 15 IBLA 345, 354 (1974). Where, as here, a decision is made within the field of expertise of the deciding official, the Board has consistently held that such a decision can be regarded as arbitrary and capricious only where it is not supportable on any rational basis. Colvin Cattle Co., 39 IBLA 176 (1979); Bert N. Smith, 36 IBLA 47, 50 (1978); United States v. Maher, 5 IBLA 209, 218, 79 I.D. 109, 113-14 (1972). See also Dunlop v. Bachowski,

5/ Provisions of the Federal Land Policy and Management Act of 1976 reinforced the Federal commitment to protection and improvement of the Federal range lands. See 43 U.S.C. §§ 1751-1753 (1976).

> 421 U.S. 560, 573 (1975). The burden is upon the appellant to show by substantial evidence that a decision is improper or that he has not been dealt with fairly. Colvin Cattle Co., supra; Bert N. Smith, supra; John T. Murtha, 19 IBLA 97, 101 (1975); Claudio Ramirez, 14 IBLA 125, 127 (1973).

However, it is not enough for a range user to show that the carrying capacity could be in error; he must show that it is erroneous. Allen v. BLM, supra; Rachel Ballow, supra.

We find first that no credence can be accorded the result of the 1978 BLM helicopter survey of the allotment, which yielded a count of 283 cattle. This figure was utilized in the EIS and the Range Management Program Plan. BLM's witness testified that the entire allotment of 29,490 acres -- much of it very rough country -- was over-flown in approximately 60 to 90 minutes. This would have required them to accurately count all of the cattle on separate areas of from 328 acres to 492 acres each for every minute of flying time (depending on whether that time was 60 or 90 minutes duration).

Next, we find that since 1971-72, when BLM set the carrying capacity at 350 CYL, the allotment has been in stable or "static" condition. 6/ Every witness on both sides so testified. There has been no deterioration. Historically, the licensed use has been much above and below the 350 CYL number, which number was the product of long experience and adjustment of usage to achieve proper utilization. The only reason for BLM's desire to reduce the number, according to the testimony at the hearing, is to start the allotment on "an upward trend," rather than allowing it to continue to remain stable in a fair to poor condition. However, this was not the reason given in the District Manager's decision which initiated this action. That decision said, "Your current grazing preference and authorized grazing use exceed the livestock grazing capacity of the allotment." We find this statement to be wholly unsupported by the evidence adduced at the hearing. To the contrary, an overwhelming preponderance of the evidence established that the allotment could continue to carry 350 CYL without deterioration.

Next, virtually all of the witnesses from both sides testified that the range would benefit from the implementation of an allotment management plan involving strategic water development, pasture rotation, fencing and herd management. All of appellant's witnesses, including the member of the advisory board and the professional range management consultant, testified that the quality of the range and its carrying capacity could be enhanced by such techniques without reducing the current livestock number of 350 CYL. Only one BLM witness testified that such a plan would not have a beneficial effect unless the cattle use were also cut, and his explanation was less than convincing. (Tr. 90-95). We find that the evidence does not support the conclusion that the current cattle use must be cut to achieve an improvement in the trend of

6/ In his answer to appellant's statement of reasons for appeal, Department counsel attempts to draw a distinction in the meaning of the words "stable" and "static" as applied to the condition of the allotment. However, all the witnesses used the word "stable," and the few employments of "static," in the context of the testimony, appeared to intend a synonym of "stable."

the condition of the range, and we note that appellant testified that he was willing to participate in an appropriate management plan.

Finally, we find that it was error to completely disregard the effect of trespassing Indian cattle on the allotment in attempting to ascertain the carrying capacity. There was virtual unanimous agreement by the witnesses that such trespass was occurring, and there was no rebuttal of Chris Claridge's testimony describing the extent of such trespass or the extent of lesser offsetting trespass by his cattle onto the Indian reservation. While it may be true that the scope and impact of such trespass would have to be estimated, perhaps imprecisely, this does not justify ignoring altogether a condition of which apparently everyone is aware. Fairness requires us to note also that this condition exists by reason of the failure of the BIA to meet its responsibility to maintain the fence, and that BIA is an agency of this Department.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Edward W. Stuebing
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge